IN THE SUPREME COURT OF MISSOURI

No. SC92582

RALPH BROWN,
Plaintiff/Appellant,
v.
MISSOURI SECRETARY OF STATE ROBIN CARNAHAN and MISSOURI STATE AUDITOR THOMAS A. SCHWEICH,
Defendants/Respondents,
and
MISSOURIANS FOR HEALTH AND EDUCATION, *et al.*,
Defendants-Intervenors/Respondents.

Appeal from the Circuit Court of Cole County, Missouri
The Honorable Daniel R. Green, Judge

APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

This appeal includes a claim that section 116.175, RSMo,[1] which imposes the duty of preparation of fiscal notes and fiscal note summaries for initiative petitions upon the State Auditor, is unconstitutional because it conflicts with article IV, section 13 of the Missouri Constitution, which limits the duties that may be imposed upon the auditor. As to this issue, this Court has exclusive jurisdiction pursuant to article V, section 3 of the Missouri Constitution. This jurisdiction extends to all issues in the case. *Taylor v. Dimmit*, 78 S.W.2d 841, 842 (Mo. 1935); accord *Williams v. Kimes*, 949 S.W.2d 899, 899 (Mo. banc 1997).

[1] All statutory references in this Brief are to the Revised Statutes of Missouri (2000) or to the 2011 Cumulative Supplement if located therein.

STATEMENT OF FACTS

A. The Parties

Appellant Ralph Brown, the plaintiff below, is a citizen, resident, registered voter and taxpayer of the State of Missouri. L.F. 318. Respondent Robin Carnahan, a defendant below, is the Secretary of State ("Secretary of State" or "Secretary"). L.F. 319. Respondent Thomas A. Schweich, also a defendant below, is the State Auditor ("State Auditor" or "Auditor"). *Id.*

B. The Initiative Petition Sample Sheets

On January 9, 2012, Robert L. Hess, II submitted six sample sheets for initiative petitions proposing statutory amendments to chapters 149 and 196 to the Secretary of State. L.F. 319; J. Ex. 1 in Appellant's Appendix ("App."), A14-A15. The six petitions were referred to as versions D, E, F, G, H, and I, respectively. *Id.* All six versions are identical except for changes to the layout of the petition grid and small changes in the wording of the enacting clause. *Id.*; *Cf.* J. Ex. 1, 6, 11, 16, 21 and 26.

C. The Summary Statements

The Secretary of State timely prepared summary statements not exceeding 100 words for all six versions. L.F. 320. The summary statements for all six versions are identical and state as follows:

> Shall Missouri law be amended to:
>
> - create the Health and Education Trust Fund with proceeds of a tax of $0.0365 per cigarette and 25% of the manufacturer's

invoice price for roll-your-own tobacco and 15% for other tobacco products;

- use Fund proceeds to reduce and prevent tobacco use and for elementary, secondary, college, and university public school funding; and
- increase the amount that certain tobacco product manufacturers must maintain in their escrow accounts, to pay judgments or settlements, before any funds in escrow can be refunded to the tobacco product manufacturer and create bonding requirements for these manufacturers?

L.F. 320-321. ("Summary Statement" or "Summary Statements").

When a tobacco tax initiative petition was on the ballot in 2006 (Constitutional Amendment No. 3), the summary statement was as follows:

Shall the Missouri Constitution be amended to create a Healthy Future Trust Fund which will:

1. be used to reduce and prevent tobacco use, to increase funding for healthcare access and treatment for eligible low-income individuals and Medicaid recipients, *and to cover administrative costs*;
2. be funded by a tax of four cents per cigarette and twenty percent on other tobacco products; and
3. be kept separate from general revenue and annually audited?

(Emphasis supplied) Pl. Ex. 31, Certified Initiative Petition Packet, 2005-005, Tobacco Tax. In proposed Constitutional Amendment No. 3, the measure allowed administrative costs up to 2% of the moneys collected (*Id.*, § 37(b)(5); for the six measures at issue in this case, it is 1.5% (L.F. 315; J. Ex. 1 at App. A19, § 149.018.4(1)).

D. The Fiscal Notes and Fiscal Note Summaries

The State Auditor timely prepared fiscal notes, as well as fiscal note summaries of no more than 50 words, excluding articles, for all six versions. L.F. 320. The fiscal notes and fiscal note summaries for all six versions are identical.[2] *Id.* The fiscal notes are found at J. Ex. 2, 7, 12, 17, 22 and 27 ("Fiscal Note" or "Fiscal Notes"). The fiscal note summary for all six versions of the Petition states:

> Estimated additional revenue to state government is $283 million to $423 million annually with limited estimated implementation costs or savings. The revenue will fund only programs and services allowed by the proposal. The fiscal impact to local governmental entities is unknown. Escrow fund changes may result in an unknown increase in future state revenue.

L.F. 321. ("Fiscal Note Summary" or "Fiscal Note Summaries").

1. The State Auditor's preparation of the Fiscal Notes and Fiscal Note Summaries

[2] The only variations are not significant for the purposes of this appeal, such as the fiscal note number being different. Pl. Ex. 33, Pl.'s Deposition Designation of the State Auditor Designee, Dep. 12:3-22.

Mr. Jon Halwes, Assistant Director of Quality Control and Planning of the Missouri State Auditor's Office, performs the drafting of the fiscal notes and fiscal note summaries and did so for the Fiscal Notes and Fiscal Note Summaries at issue in this case. Pl. Ex. 35, Def. Schweich's Answers to Pl. Brown's Interrogatories, Interrog. Nos. 9 and 10. No one else in the Auditor's Office reviewed the Fiscal Notes or Fiscal Note Summaries. Pl. Ex. 33, Dep. 17:2-5.

To prepare a fiscal note, the Auditor's policy, which was used for these six initiative petition sample sheets, is to send copies of the initiative petition to various state and local governmental entities requesting that the entities review the same and provide information regarding the entities' estimated costs or savings, if any, for the proposed initiative. Pl. Ex. 35, Interrog. No. 5.

The proposed ballot measures (the initiative petitions) were sent to all state governmental entities that the Auditor has on file. *Id.*, Interrog. No. 7. Then a selection of local governmental entities was chosen to solicit their input, focusing on local governmental entities that have a history of responding to requests for information. *Id.*

Proponents or opponents may also submit fiscal impact statements, but the Auditor's position is that it has no duty to notify members of the public of his receipt of the initiative petition from the Secretary of State and he does not notify the public in any way when he receives an initiative petition. *Id.*, Interrog. No. 5. The Auditor did not notify the public in any way when he received the six sample sheets at issue in this case. *Id.*

The submissions received serve as the sole basis for the fiscal note content. *Id.* No one else was consulted as regards the fiscal impact of the proposed measures or in drafting the fiscal notes. *Id.*, Interrog. Nos. 14 and 15.

After receiving submissions from state and local government entities, and submissions from proponents or opponents if any are received, the Auditor reviews the submissions for "completeness and reasonableness." *Id.*, Interrog. No. 5. The Auditor's review for completeness consists of making sure that the entity's response conveys a complete representation of what the entity intended to send and is reasonably related to the proposal and to the suggested fiscal impact reported by the entity. *Id.* Specifically, the Auditor is looking at what it did receive to make sure there are not missing pages or a break in the continuity of information. Dt. Ex. B, Defs.-Intervenors' Dep. Designation of Auditor's Designee, Dep. 28:12-29:2. As regards "reasonably related to the proposal," the Auditor is looking at whether the submitter is, for example, addressing the particular issue or is actually off point and talking about something completely different. *Id.*, Dep. 28:3-15. If the Auditor has any questions regarding the submissions from other entities, the Auditor may follow up with that entity. Pl. Ex. 35, Interrog. No. 5.

In creating fiscal notes, the Auditor's normal policy and procedure is to include the submissions of the state and local governmental entities, proponents and opponents, verbatim if possible, and make as few changes thereto as is practical. *Id.* This is the entire extent of the Auditor's carrying out preparation of the fiscal notes generally and in the case of the six proposed initiatives at issue in this case. *Id.*, Interrog. Nos. 5, 6, 13,

14, 22. Mr. Halwes, did, however, consult a Wikipedia page about the tobacco settlement. Dt. Ex. B, Dep. 56:6-11.

The Auditor takes into account all submissions he has received and drafts the fiscal note summary, a 50 word or less summary, based upon the fiscal note. Pl. Ex. 35, Interrog. No. 5. If the Auditor finds a response or submission to be unreasonable, that affects the weight given to that response in preparing the fiscal note summary. *Id.* An example given by the Auditor was a response from a local government in a proposed measure to eliminate the individual income tax and replace it with a sales tax – the responding entity said that it may as well blow up their roads and board up city hall. The Auditor found this to be an unreasonable response and it was not considered in preparing the fiscal note summary. Pl. Ex. 33, Dep. 31:1-11. Whether something is unreasonable is based upon Mr. Halwes' experience in state government and his overall knowledge and understanding of business and economic issues. *Id.*, Dep. 31:12-16. It is also based upon what he believes the proposed measure does through his reading of the proposed measure. *Id.*, Dep. 31:17-21. The Auditor found none of the responses or submissions for the six fiscal notes at issue in this case to be unreasonable. *Id.*, Dep. 32:14-18.

2. The inclusion in the Fiscal Note Summary of the statement, "The revenue will fund only programs and services allowed by the proposal."

The second sentence of the Fiscal Note Summaries does not state a cost or savings, Pl. Ex. 33, Dep. 46:7-47:5. The second sentence states that there will be a limitation on what the revenue generated by the proposed measure can be used to fund.

L.F. 321. The Auditor explained that he does not "have the luxury" of seeing what the summary statement being drafted by the Secretary of State will say and he thinks it is important that if a voter sees that the State is going to get an extra $300 million, that it is important for the voter "to understand that there may be restrictions on how that money can be spent." Pl. Ex. 33, Dep. 47:25-48:10. The Auditor states that the reason is so the voter makes an informed decision and that the actual uses of the funds may be in the summary statement. *Id.*, Dep. 48:11-17. The Auditor explained that when there is a restriction on use of funds generated by a proposed measure, he would include a statement to that effect – if he has enough words left within the 50 word limit. *Id.*, Dep. 47:12-24, 50:10-51:7. When there is no restriction on use of funds, he would not address it in the fiscal note summary. *Id.*, Dep. 47:12-24.

3. Fiscal Note and Fiscal Note Summary preparation

The Auditor admits that the preparation of a fiscal note is not auditing, that it is neither a financial audit nor a performance audit. The Auditor admits that a fiscal note is not an audit or an audit report. The Auditor admits that the preparation of a fiscal note summary is not the act of auditing or an audit. Pl. Ex. 33, Dep. 20:21-21:9; Tr. 26:8-14. Further, the Auditor does not consult any audits in order to prepare a fiscal note for an initiative petition. Tr. 34:3-10.

The Auditor further admits that Government Auditing Standards (the "Yellow Book") do not apply to the process of fiscal note or fiscal note summary preparation. Pl. Ex. 33, Dep. 21:10-15. He admits Governmental Accounting Standards Board ("GASB") standards do not apply to fiscal notes or fiscal note summaries. *Id.*, Dep. 21:16-21. In

fact, the Auditor is not aware of any codification of professional standards that applies to fiscal note and fiscal note summary preparation. *Id.*, Dep. 21:22-22:18.

The fiscal note is essentially a verbatim summary of submissions received from other agencies. Pl. Ex. 35, Interrog. No. 5; Tr. 35:4-10. The fiscal note summary is a summarization of the contents of the fiscal note. Tr. 31:10-22. The Auditor admitted that through a fiscal note summary, he is not trying to summarize the probable effects of the measure if it is passed; he is "trying to summarize the information that's been presented to us in terms of what reasonably could be expected to happen physically[3] to the state if the initiative is passed." Pl. Ex. 33, Dep. 67:24-68:5. Unless a submission is simply unreasonable, the Auditor defers to the agency's expertise. *Id.*, Dep. 68:6-11. The Auditor admits the fiscal note summary is a forecast of what *could* happen based upon the submissions. Tr. 41:7-24 (emphasis supplied).

According to the Auditor, no special qualifications or degrees are prerequisites to preparing a fiscal note and fiscal note summary. Tr. 32:4-13. No special training exists for the preparation of fiscal notes and fiscal note summaries. Tr. 31:23-32:3. No written procedures exist on how to prepare fiscal notes and fiscal note summaries. Tr. 34:19-35:4.

The Auditor believes he follows the processes and procedures that are addressed in *Missouri Mun. League v. Carnahan*, 303 S.W.3d 573 (Mo. App. 2010) and *Mun. League*

[3] Although not on Mr. Halwes' deposition errata sheet, this word may have actually been "fiscally".

v. Carnahan, --- S.W.3d ----, 2011 WL 3925612 (Mo. App. 2011). Tr. 28:20-25. The Auditor maintains that these cases mean he does not have to do any independent analysis and he does not have to "second guess" anything that is submitted to him by an agency. Tr. 92:14-93:1.

E. The Official Ballot Titles

The Secretary of State certified the official ballot titles for all six versions on February 10, 2012. L.F. 320. The Official Ballot titles are therefore identical, being comprised of the identical summary statement followed by the identical fiscal note summary. See L.F. 320; J. Ex. 3, 8, 13, 18, 23 and 28. As such, the Official Ballot Title for all six proposed initiative petitions states:

> Shall Missouri law be amended to:
>
> - create the Health and Education Trust Fund with proceeds of a tax of $0.0365 per cigarette and 25% of the manufacturer's invoice price for roll-your-own tobacco and 15% for other tobacco products;
> - use Fund proceeds to reduce and prevent tobacco use and for elementary, secondary, college, and university public school funding; and
> - increase the amount that certain tobacco product manufacturers must maintain in their escrow accounts, to pay judgments or settlements, before any funds in escrow can be refunded to the

> tobacco product manufacturer and create bonding requirements for these manufacturers?
>
> Estimated additional revenue to state government is $283 million to $423 million annually with limited estimated implementation costs or savings. The revenue will fund only programs and services allowed by the proposal. The fiscal impact to local governmental entities is unknown. Escrow fund changes may result in an unknown increase in future state revenue.

Id.; App. A27.

F. The Lawsuit Below

This is a case under Chapter 116, involving a challenge to the fiscal note, fiscal note summary, summary statement, and official ballot title of six initiative petitions relating to tobacco regulation. L.F. 6-24; L.F. 318, 320. Plaintiff also challenges the constitutionality of section 116.175. *Id.* The suit was filed February 17, 2012, within ten days of the Secretary's certification of official ballot titles. L.F. 1, 320. MHE, Taylor and McCarter moved to intervene and the motion was granted over Plaintiff's objection. L.F. 238.

The hearing took place on May 7, 2012. App. A1; Tr. 1. On May 10, 2012, Plaintiff Brown filed suggestions with the trial court regarding the issue of res judicata and the previous litigation regarding the unconstitutionality of section 116.175 (L.F. 4, App. A12), which is addressed in the next section of this Brief. The Auditor and the Intervenors filed replies to the suggestions. L.F. 4-5.

The final judgment was issued on May 21, 2012. L.F. 5, App. A13. In the final judgment, the trial court found that the res judicata claim had been waived because it had not been raised earlier, or, in the alternative, that it did not apply because the initiative petitions are different and the parties are different. App. A12. The trial court found in favor of defendants on all counts of the petition. App. A13.

G. Previous litigation regarding the constitutionality of section 116.175

Ralph Brown sued State Auditor Thomas Schweich four separate times in Cole County Circuit Court before the same judge who entered four separate final judgments on the same day, March 28, 2012. Each case is identically styled as the parties are identical in each — *Ralph Brown v. Missouri Secretary of State Robin Carnahan and Missouri State Auditor Thomas A. Schweich*. The four case numbers are: (1) Case No. 11AC-CC00400; (2) Case No. 12AC-CC00046; (3) Case No. 12AC-CC00048; and (4) Case No. 12AC-CC00077. Case No. 12AC-CC00077 was appealed to this Court and is SC92492. Certified copies of the final judgment and docket sheet in each of the other three cases were submitted to this Court in SC92492 with Plaintiff Brown's motion to dismiss that appeal filed on May 25, 2012. The trial court below took judicial notice of the four Brown cases. Tr. 23:19-24:9. This Court may take judicial notice of the filings in SC92492 which include certified copies of the final judgment in the three cases not appealed and certified copies of the docket sheets in the three cases not appealed. The other four *Brown* cases were not consolidated for any purpose. In fact, the trial court used judicial notice to accept evidence presented in one of the cases in the other three, which was agreed to by the parties. Supreme Court case file and docket in SC92492;

Brown v. Missouri Secretary of State, et al., Case No. 11AC-CC00400, Certified Final Judgment, App. A31-A35; *Brown v. Missouri Secretary of State, et al.,* Case No. 12AC-CC00046, Certified Final Judgment, App. A41-A45; *Brown v. Missouri Secretary of State, et al.,* Case No. 12AC-CC00048, Certified Final Judgment, Appellant's App. A50-A55.

The result in each of the other four *Brown* cases is identical—the trial court ruled in favor of Plaintiff Brown finding that the delegation to the State Auditor of the duty to prepare a fiscal note and summary provided by section 116.175 violates the limitation of article IV, section 13 of the Missouri Constitution and those statutory provisions are unconstitutional. *Id.* As already noted, of the four cases with identical rulings, the State Auditor only appealed one case. Supreme Court case file and docket in SC92492; *Brown v. Missouri Secretary of State, et al.,* Case No. 11AC-CC00400, Certified Docket Sheet, App. A36-A40; *Brown v. Missouri Secretary of State, et al.,* Case No. 12AC-CC00046, Certified Docket Sheet, App. A46-A49; *Brown v. Missouri Secretary of State, et al.,* Case No. 12AC-CC00048, Certified Docket Sheet, App. A56-A59. With the final judgments in those three cases having been issued March 28, 2012, an appeal should have been filed either on April 9, 2012 (10 days later pursuant to section 116.190[4]) or on May 7, 2012 (40 days later, if Rules 81.04(a) and 81.05(a)(1) apply because it was an appeal from a declaratory judgment). Either way, the time for appeal had run before final judgment was entered in this case.

[4] The tenth day is a Saturday; the 9th is Monday.

Notable, however, is that May 7, 2012 is the date of the hearing in this case in the trial court. Tr. 1; L.F. 341. The court below found that Plaintiff had waived any claim based upon res judicata because he had not raised it previously. App. A12.

POINTS RELIED ON

I. THE TRIAL COURT ERRED AS A MATTER OF LAW IN HOLDING THAT THE SECRETARY OF STATE'S SUMMARY STATEMENT WAS FAIR AND SUFFICIENT BECAUSE THE SUMMARY STATEMENT UNFAIRLY AND INSUFFICIENTLY REPRESENTS THE UNDERLYING INITIATIVE IN THAT THE SUMMARY STATEMENT INCORRECTLY SUMMARIZES THE POSSIBLE USES OF FUNDS GENERATED BY THE UNDERLYING INITIATIVE AS WELL AS THE INITIATIVE'S EFFECT ON OBLIGATIONS OF CERTAIN TOBACCO MANUFACTURERS.

Missouri Mun. League v. Carnahan, 303 S.W.3d 573 (Mo. App. 2010)

Cures without Cloning v. Pund, 259 S.W.3d 76 (Mo. App. 2008)

Buchanan v. Kirkpatrick, 615 S.W.2d 6 (Mo. 1981)

II. THE TRIAL COURT ERRED AS A MATTER OF LAW BY FINDING THAT THE FISCAL NOTE SUMMARY WAS SUFFICIENT AND FAIR BECAUSE THE FISCAL NOTE SUMMARY IS NEITHER SUFFICIENT NOR FAIR AND EXCEEDS THE STATUTORY AUTHORITY OF THE AUDITOR AND INVADES THE PROVINCE OF THE SECRETARY OF STATE IN THAT THE FISCAL NOTE SUMMARY INCLUDED A SUMMARY OF THE MEASURE ITSELF RATHER THAN SIMPLY THE COST OR SAVINGS OF THE MEASURE WHEN THE FISCAL NOTE SUMMARY USED THE PHRASE, "THE REVENUE WILL FUND ONLY PROGRAMS AND SERVICES ALLOWED BY THE PROPOSAL."

Cures without Cloning v. Pund, 259 S.W.3d 76 (Mo. App. 2008)

Emery v. Wal-Mart Stores, Inc., 976 S.W.2d 439 (Mo. 1998)

§ 116.190, RSMo

III. THE TRIAL COURT ERRED AS A MATTER OF LAW BY DENYING PLAINTIFF'S REQUEST FOR A DECLARATORY JUDGMENT THAT SECTION 116.175 VIOLATES MISSOURI'S CONSTITUTION BECAUSE SECTION 116.175 IS DIRECTLY IN CONFLICT WITH ARTICLE IV, SECTION 13 OF THE MISSOURI CONSTITUTION IN THAT SECTION 116.175 PURPORTS TO IMPOSE A DUTY ON THE AUDITOR THAT IS NOT "RELATED TO THE SUPERVISING AND AUDITING OF THE RECEIPT AND EXPENDITURE OF PUBLIC FUNDS."

Farmer v. Kinder, 89 S.W.3d 447 (Mo. banc 2002)

Thompson v. Committee on Legislative Research, 932 S.W.2d 392 (Mo. banc 1996)

MO. CONST. art. IV, § 13

IV. THE TRIAL COURT ERRED AS A MATTER OF LAW BY DENYING PLAINTIFF'S REQUEST FOR A DECLARATORY JUDGMENT THAT SECTION 116.175 VIOLATES MISSOURI'S CONSTITUTION BECAUSE CLAIM PRECLUSION REQUIRED ENTRY OF JUDGMENT IN THAT THE SAME ISSUE HAD PREVIOUSLY BEEN LITIGATED BETWEEN THE SAME PARTIES, A FINAL JUDGMENT HAD BEEN ENTERED BY ANOTHER COURT AND THAT JUDGMENT HAS NEVER BEEN APPEALED.

Chesterfield Village, Inc. v. City of Chesterfield, 64 S.W.3d 315 (Mo. banc 2002)

King General Contractors, Inc. v. Reorganized Church of Jesus Christ of Latter Day Saints, 821 S.W.2d 495 (Mo. banc 1991)

Fleming v. Mercantile Bank & Trust Co., 796 S.W.2d 931 (Mo. App. 1990)

47 AM. JUR. 2D *Judgments* § 636 (2006)

STANDARD OF REVIEW

The parties argued the fairness and sufficiency of the Secretary's summary statements based on stipulated facts and joint exhibits. Thus, the only question on appeal as to the summary statements is whether the trial court drew the proper legal conclusions, which this Court reviews *de novo." Missouri Mun. League v. Carnahan*, 303 S.W.3d 573, 580 (Mo. App. 2010)("*MML I*")*(*citing *Overfelt v. McCaskill*, 81 S.W.3d 732, 735 (Mo. App. 2002)).

Although non-stipulated evidence was presented at the trial court as regards the Auditor's processes and procedures in preparing fiscal notes and fiscal note summaries, the evidence "is uncontested when a party 'has admitted in its pleadings, by counsel, or through the [party's] individual testimony the basic facts of [other party's] case.'" *White v. Director of Revenue*, 321 S.W.3d 298, 308 (Mo. banc 2010) (quoting *All Am. Painting, LLC v. Fin. Solutions & Assocs. Inc.,* 315 S.W.3d 719, 723 (Mo. banc 2010)). "In such cases, the issue is legal, and there is no finding of fact to which to defer." *Id.*

As to the portions of the decision below that involve the constitutional validity and construction of state statutes, this Court's review is *de novo. School Dist. of Kansas City v. State*, 317 S.W.3d 599, 604 (Mo. banc 2010). And the issue of the application of res judicata as a bar to the relitigation of the issue of unconstitutionality of section 116.175 is also a *de novo* review. See *Murphy v. Carron,* 536 S.W.2d 30, 32 (Mo. banc 1976).

INTRODUCTION

This appeal, and similar appeals argued on the same date, present an important opportunity for this Court to address procedural requirements for the initiative petition process. Although there are a good number of Court of Appeals cases addressing these procedural requirements, this Court has not had the occasion to analyze the current version of the statutory requirements.

This Court has said that the procedural requirements are very important. *Buchanan v. Kirkpatrick,* 615 S.W.2d 6, 11 (Mo. banc 1981). The Court must balance the interests of the people in being able to change laws through the initiative against the rights of those opposed to such changes to have a meaningful opportunity for discussion of those changes. *Id.* The issues in this appeal ask the Court to enforce the procedural requirements to ensure that state officials are not allowed to present inaccurate information to those who are considering whether to sign a proposed initiative. This appeal also addresses the Auditor's role in the initiative process and whether that role exceeds the restrictions placed on the Auditor's duties by the language of the Constitution.

The legal issues presented herein are: (1) whether the Secretary of State has a duty to accurately summarize the initiative petition and whether an inaccurate summary violates the statutory requirement that the summary be sufficient and fair (Point I); (2) whether the State Auditor may comment to potential signers on the effect of the initiative even though the statutes limit his role to estimating the costs or savings from the initiative (Point II); (3) whether the statutory requirement that the state auditor predict future costs

or savings from a proposed initiative is in conflict with the Constitution, which restricts his role to activities related to the supervising and auditing of the receipt and expenditure of public funds (Point III); and (4) whether Ralph Brown should be required to litigate the constitutionality of the statute again in this case when he already prevailed against the Auditor in other lawsuits, the results of which were not appealed (Point IV).

A review of the issues presented in this appeal will lead the Court to the conclusion that the trial court must be reversed.

ARGUMENT

I. THE TRIAL COURT ERRED AS A MATTER OF LAW IN HOLDING THAT THE SECRETARY OF STATE'S SUMMARY STATEMENT WAS FAIR AND SUFFICIENT BECAUSE THE SUMMARY STATEMENT UNFAIRLY AND INSUFFICIENTLY REPRESENTS THE UNDERLYING INITIATIVE IN THAT THE SUMMARY STATEMENT INCORRECTLY SUMMARIZES THE POSSIBLE USES OF FUNDS GENERATED BY THE UNDERLYING INITIATIVE AS WELL AS THE INITIATIVE'S EFFECT ON OBLIGATIONS OF CERTAIN TOBACCO MANUFACTURERS.

The trial court misinterpreted the Secretary's of State's statutory duty to provide a summary of the initiative petition that was both sufficient and fair. Review of this point of error requires only an interpretation of law and is thus *de novo*. The analysis requires first a review of the statute's plain language. Then this Court should review the Secretary's Summary Statement and the language of the underlying initiative to determine if the Summary Statement meets the statutory obligation to sufficiently and fairly summarize the initiative.

A. The legislature has provided important procedural safeguards to prevent abuse of the initiative petition process

Chapter 116 of the Revised Statutes specifies procedures for the placing of an initiative petition on the ballot. This Court has long recognized that procedural safeguards – both those in the Constitution and those created by the legislature -- are

important and necessary in the initiative petition process for two reasons "(1) to promote an informed understanding by the people of the probable effects of the proposed amendment; or (2) to prevent a self-serving faction from imposing its will upon the people without their full realization of the effects." *Buchanan,* 615 S.W.2d at 11. See also *Knight v. Carnahan,* holding that whether "statutory requirements for a validly enacted law [were] followed" is such an important issue that it may be reviewed even thought the measure had already been adopted by a vote of the people. 282 S.W.3d 9, 16-17 (Mo. App. 2009). Two important legislative safeguards are the requirement that the Secretary of State provide a summary of the proposed initiatives and that the Courts review that summary statement. §§ 116.334 and 116.190.

1. The Secretary has an obligation to summarize the initiative petition

In order to pass laws by the initiative, the Constitution requires the proponents to obtain a certain number of signatures and to submit those to the Secretary. MO. CONST. art. III, § 50. The legislatively enacted procedure for submitting those signatures requires the proponents to submit signature pages in a certain form that must be approved by the Secretary in advance of circulation. § 116.180. In addition, the Secretary must review the initiative petition and summarize it. § 116.334. This summary is placed on each signature page and signatures will not be counted unless the Secretary's summary is on each page in the location mandated. § 116.120.

Because of these statutes, anyone considering whether to sign an initiative petition will see the official ballot title, consisting of the Secretary's short summary of the

initiative together with a fiscal impact summary provided by the Auditor. This information is printed on the initiative signature page directly above the place where citizens may sign so that they can easily read about the initiative before they sign. App. A17; J. Ex. 1, 6, 11, 16, 21 and 26. The importance of this summary is self-evident: it is to give the citizens a quick and impartial way to make decisions about whether they want they measure on the ballot.

2. Citizens have the right to petition the courts for review of the Secretary's summary statement

When the Secretary prepares her portion of the official ballot title, the legislature has mandated that her statement be 100 words or less and that the manner of summarizing shall be using language that is not "argumentative" or "likely to create prejudice for or against the proposed measure." § 116.334. The statutory scheme also allows the Secretary's summary statement to be reviewed by the Courts upon petition of "any citizen who wishes to challenge" the statement. § 116.190. This review is to determine if the summary statement is "insufficient or unfair." *Id.* Allowing citizens to challenge the summary statement is an important protection to make sure those opposed to the measure have a sufficient opportunity to challenge the summary that petition signers will see. *Overfelt v. McCaskill,* 81 S.W.3d 732, n.3 (Mo. App. 2002).

A close review of the statutory language makes clear that the Secretary's obligation in preparing her summary statement is two-fold. § 116.334, App. A29. First, the Secretary must provide a summary. *Id.* In addition, this summary must be in language that is neutral. *Id.* The two-part analysis is clearly reflected in section

116.190's discussion of the factors the court should consider when a challenge has been brought. A challenge may be brought if any citizen considers the statement "insufficient" *or* "unfair." § 116.190. A plain meaning of the statute leads to the conclusion that either insufficiency or unfairness, or both, justify granting a plaintiff's request for a different ballot title. A summary could be invalid if it is insufficient (although it might use words that are not argumentative and unfair) but it could also be re-written because it is sufficient, but uses words that are unfair and argumentative.

B. The sufficiency and fairness requirement in section 116.190

Words in a statute are, of course, interpreted using their plain and ordinary meaning. *Utility Serv. Co., Inc. v. Department of Labor and Indus. Relations*, 331 S.W.3d 654, 658 (Mo. banc 2011). A "summary" statement must be a "short restatement of the main points." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2289 (2002). A thing is "insufficient" if it is "inadequate to some designated need or purpose." *Id.* at 1172. Since a summary is to "restate the main points," a summary statement is insufficient if it does not adequately restate the main points of the initiative.

Although the plain language of the statute provides the legal standard necessary to analyze the issue in this Point, case law is consistent with the plain language analysis outlined above. This Court has never addressed the meaning of the current language of the statute, but the Court of Appeals has.

As this Court reviews the jurisprudence of the Court of Appeals, it will notice that the language is not always precise. For example, sometimes language in cases from the Court of Appeals has combined insufficient and unfair into one concept, using language

that changes the "or" separating "insufficient" from "unfair" to an "and." See *Hancock v. Secretary of State,* 885 S.W.2d 42, 49 (Mo. App. 1994) (writing that the statute means the Secretary may not "inadequately *and* with bias" summarize the consequences of the initiative). Nevertheless, the cases generally follow the plain meaning of the statute even when the language of the cases has been imprecise.

The Court of Appeals has said "[i]t is incumbent upon the Secretary in the initiative process to promote an informed understanding of the probable effect of the proposed amendment." *Cures without Cloning v. Pund*, 259 S.W.3d 76, 82 (Mo. App. 2008)(citing *Buchanan,* 615 S.W.2d at 11). Similarly the Court of Appeals has written that the summary must "accurately reflect[] the legal and probable effects of the initiative." *Missouri Municipal League v. Carnahan,* 303 S.W.3d 573, 584 (Mo. App. 2010)("*MML I*"). This type of language reflects the mandate of *Buchanan* that procedural safeguards such as section 116.334 and section 116.190 must promote an informed understanding of the initiative.

1. *Cures Without Cloning v. Pund*

The decision in *Cures* re-wrote a summary statement and agreed with plaintiffs' challenge that the summary statement "mischaracterized" the initiative because the summary statement said the initiative would "repeal" a ban on human cloning when the initiative did no such thing. 259 S.W.3d at 81-83. The Court of Appeals agreed that the failure of the Secretary to correctly summarize the initiative required modifications to the summary. *Id.* Although the court properly focused on the accuracy of the summary statement rather than whether the words used were argumentative, the language of the

opinion finds that the "mischaracterization" of the initiative made the summary statement *both* insufficient *and* unfair. *Id.* Interestingly, the *Cures* court did not discuss whether the language was argumentative or likely to create prejudice. Rather the court said that when the Secretary fails to correctly summarize, the ballot summary she provides is insufficient and unfair because it "does not fairly summarize any goal or effect of the initiative proposal." *Id.* at 82. The *Cures* court seems to hold that a summary statement that mischaracterizes the initiative is both insufficient *and* unfair. This holding is perfectly consistent with the plain language of the statute.

2. *Missouri Municipal League v. Carnahan*

A similar result obtained in a case challenging the summary of a petition to change Missouri's eminent domain laws, *MML I,* 303 S.W.3d 573. In that case, the trial court engaged in a significant rewrite of a summary statement as a result of challenges that it misstated both the effect of the initiative on existing law and the effect of the language of the initiative itself. *Id.* at 581. The *MML I* court quoted the language from *Hancock*, quoted above, which seems to say a summary statement must be *both* insufficient and unfair in order for a challenge to succeed. But the court's language later in the opinion makes clear that it recognized that the statute protects from either insufficiency or unfairness.

In affirming the portion of the trial court's decision not to rewrite a certain section, the appellate court articulated the analysis correctly as whether the summary language "accurately reflects the legal and probable effects of the initiative." *Id.* at 584. The court went on to apply that standard when it affirmed the trial court's decision to rewrite

another portion of the summary statement because the summary statement incorrectly told potential signers that the initiative would establish a requirement for just compensation upon a taking of property when such a requirement already existed in the law. *Id.* at 588. Without commenting on whether this inaccuracy made the summary "insufficient" or "unfair" or both, the Court of Appeals modified the trial court's summary revision as well as the Secretary of State's original language. *Id.*

The plain language of the statute requires the Secretary to provide an adequate and correct summary of an initiative petition and to do so using language that is not argumentative. The Court of Appeals has followed this directive in *Cures* and *MML I.* The correct standard for the issue addressed in this point, is best articulated in *MML I,* as whether the summary "accurately reflects the legal and probable effects of the initiative." A summary that fails to do so is insufficient but, as the Court of Appeals has tacitly acknowledged, it is also "unfair" within the common meaning of the term: "providing an insufficient *or* inequitable basis for judgment or evaluation." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2495 (2002) (emphasis supplied).

C. The Summary Statement here is insufficient and/or unfair

In this case, the evidence was undisputed that the Summary Statement does not accurately reflect the legal and probable effects of the initiative and that the summary affirmatively mischaracterizes those effects. The Summary Statements are identical in each of the six versions of the initiative petition at issue in this case as follows:

Shall Missouri law be amended to:

- create the Health and Education Trust Fund with proceeds of a tax of $0.0365 per cigarette and 25% of the manufacturer's invoice price for roll-your-own tobacco and 15% for other tobacco products;
- use Fund proceeds to reduce and prevent tobacco use and for elementary, secondary, college, and university public school funding; and
- increase the amount that certain tobacco product manufacturers must maintain in their escrow accounts, to pay judgments or settlements, before any funds in escrow can be refunded to the tobacco product manufacturer and create bonding requirements for these manufacturers?

1. The second bullet of the Summary Statement is insufficient and/or unfair

The Summary Statement is insufficient and therefore unfair in that the second bullet point incorrectly advises those considering whether to sign the initiative as to the programs for which funds generated by adoption of the initiative may be used. The Summary Statement identifies two and only two uses, while the truth is that the funds generated through the new tax may be used for many more purposes.

Specifically, the second bullet point of the Summary Statement tells potential signers that if the initiative is adopted the effect is that taxes generated by the proposal will be used to: (1) reduce and prevent tobacco use; (2) for elementary, secondary, college and university public school funding. Since these are the only purposes listed, the

grammatical rule that the expression of one is the exclusion of others tells potential signers of the initiative petition that uses of the funds are limited to only those two purposes (and their subsets). "*Expressio unius est exclusio alterius*," BLACK'S LAW DICTIONARY 661 (9th ed. 2009). The Secretary provides no indication to potential signers of the petition that there might be other uses for the funds, *i.e.*, using the word "including" or the phrase "among others."

But an examination of the actual initiative reveals that, contrary to the Secretary's "summary," the initiative itself (App. A18-A26) contains a rather complex series of funds the uses of which are not limited to reducing tobacco use and funding education. In addition to the two uses identified in the Summary Statement, a review of the initiative shows the new funds may also be used to (3) pay administrative costs (§ 149.018.4(1)), (App. A19); (4) provide replacement revenues for the funds that receive current tobacco tax revenues when tax revenues decrease due to the expected decrease in purchase of tobacco (App. A19). The replacement revenue includes funding for the state legal defense fund, loan forgiveness for medical professionals agreeing to serve underserved areas, parenting classes and transitional Medicaid expenses of welfare recipients (§ 149.018.4(3); § 191.831; § 105.711; § 660.016) (App. A19); (5) fund the Attorney General's enforcement of the Master Settlement Agreement (§ 149.018.6(4)) (App. A20); and (6) establish loan forgiveness programs for medical professionals who work in underserved areas of the state (this is *not* part of the statewide tobacco control program and is apparently different than the program in § 660.016) (§ 149.018.6) (App. A20).

Therefore, the Secretary's Summary Statement is insufficient in that it inadequately informs those considering signing the initiative of the "probable effect of the proposed amendment." *Cures*, 259 S.W.3d at 82. It also fails to accurately reflect the "legal and probable effects of the initiative." *MML I*, 303 S.W.3d at 584. The probable effect – indeed the indisputable effect – is that the funds will be available for all sorts of things not included in the Secretary's Summary Statement. The legal effect is *not* that use of funds is limited to tobacco use reduction and education.

This insufficiency and unfairness is further compounded by the Auditor's inclusion of language that should not have been included in the Fiscal Note Summary. The Auditor's Fiscal Note Summary, which appears in the official ballot title immediately under the Secretary's Summary Statement, tells potential signers that the "revenue will fund *only* programs and services allowed by the proposal." App. A27 (emphasis supplied). So, when taken together the Official Ballot Title clearly communicates to potential signers that the uses of the revenue are limited to *only* tobacco use prevention and education funding. That is not the case. Simple logic tells us that a potential signer's decision on whether to support an initiative will be influenced by limitations on how the funds could be used. The Secretary's statement is inadequate because it incorrectly summarizes the initiative in a way that fails to advise potential signers of the initiative's probable effects. *MML I* at 584; § 116.190.

2. The third bullet of the Summary Statement is insufficient and/or unfair

The third bullet point of the Secretary's Summary Statement is also insufficient and therefore unfair because it "does not fairly summarize any goal or effect of the initiative proposal" – it mischaracterizes the initiative, because it is simply wrong in two ways.

First, the Summary Statement tells potential signers that the initiative "increase[s] the amount that certain tobacco product manufacturers must maintain in their escrow accounts . . . before any funds in escrow can be refunded." This is absolutely wrong. The initiative substantively leaves intact an existing statute, section 196.1003(b)(1), which specifies the amount that tobacco manufacturers must place in an escrow account. App. A22-23. The initiative instead changes the escrow fund provisions by amending section 196.1003(b)(2)(B), which deals with how much can be *refunded* from escrow. App. A23. Although the Secretary represents that the initiative changes the amount required "before any funds . . . can be refunded," that language is *not* found anywhere in the initiative itself. An inspection of what *is* in the initiative shows that the Secretary's attempt to explain the effect of the changes is inadequate because it is wrong. Because section 196.1003(b)(1) is not substantively changed, "the amount that certain manufacturers must maintain . . . before any funds . . . can be refunded" does not change.

Next, the phrase in the third bullet point, telling potential signers that the initiative will "create bonding requirements for these manufacturers" is also wrong. While it is true that the initiative "creates" a bonding requirement, saying that the bonding requirement is on "these" manufacturers, *i.e.,* those that receive refunds from their escrow accounts, is wrong. The pronoun "these" clearly refers to the immediately preceding phrase. Yet, the

bonding requirement is not *only* on these manufacturers, but rather on all manufacturers who have escrow obligations regardless of whether they are entitled to a refund (so the requirement is not on "these" manufacturers). Moreover, the bonding requirement does not extend to all of "these" manufacturers (who are entitled to a refund), because bonds are only required of those who failed to fully meet their escrow obligations or who had not previously had an escrow account. Those who have complied with the escrow requirements and received refunds are not required to post a bond. App. A25, § 196.1023.4.

The first insufficiency in bullet three, misstating that the amount held in escrow prior to refund is impacted by the initiative, is the exact same type of insufficiency discussed in *MML I.* There, the court held that the Secretary's mischaracterization of existing law required a rewrite of the summary statement to make it sufficient. The same is true here because the effect on existing law is not correctly represented. The insufficiency as to bonding requirements is more of the type discussed in *Cures* because the effect of the initiative *itself* is not as the Secretary represents.

D. Conclusion

The Secretary had an obligation to accurately summarize the probably legal effect of the initiative petition. Because the Secretary misstates the way funds generated by the initiative can be used and/or because the Secretary misstates certain provisions related to obligations of certain tobacco manufacturers, her summary is insufficient and unfair. The trial court should have rewritten the summary to accurately characterize the effect of the measure.

II. THE TRIAL COURT ERRED AS A MATTER OF LAW BY FINDING THAT THE FISCAL NOTE SUMMARY WAS SUFFICIENT AND FAIR BECAUSE THE FISCAL NOT SUMMARY IS NEITHER SUFFICIENT NOR FAIR AND EXCEEDS THE STATUTORY AUTHORITY OF THE AUDITOR AND INVADES THE PROVINCE OF THE SECRETARY OF STATE IN THAT THE FISCAL NOTE SUMMARY INCLUDED A SUMMARY OF THE MEASURE ITSELF RATHER THAN SIMPLY THE COST OR SAVINGS OF THE MEASURE WHEN THE FISCAL NOTE SUMMARY USED THE PHRASE, "THE REVENUE WILL FUND ONLY PROGRAMS AND SERVICES ALLOWED BY THE PROPOSAL."

Similar to the first point relied on, Point II involves a legal interpretation of undisputed evidence. The standards for judging the fiscal summary are the same as for judging the summary statement. It must be sufficient and fair. § 116.190. The fiscal note summary, which is included in a prominent location on each page used to gather signatures for the initiative petition, purported to estimate revenues that would be generated by the initiative and then contained the following phrase (emphasis supplied):

The revenue will fund only programs and services allowed by the proposal.

As discussed in Point I, the legislature has assigned the Secretary of State the responsibility for summarizing the probable effect of an initiative. While the Constitutional provision concerning the initiative contemplates a role for the Secretary of State, the Auditor's preparation of a fiscal note is neither mentioned nor reasonably

implied from the plain language of article III, section 50. Instead, the Auditor's duty to prepare a fiscal note and fiscal note summary is found solely in statute, specifically section 116.175. When authority to act is created solely by statute, agencies such as the Auditor's office have only the authority delegated by the legislature and may not exceed that authority. *Missouri Hosp. Ass'n v. Air Conservation Comm'n,* 874 S.W.2d 380, 397 (Mo. App. 1994).

The statute instructs the Auditor to assess the fiscal impact of the proposed initiative and prepare a fiscal note and a summary of that fiscal note. § 116.175. While the fiscal note does not itself appear on signature pages, the fiscal note *summary* does appear just below the Secretary's summary statement. § 116.180. The two together are referred to as the official ballot title. § 116.010(4). As to the contents of the fiscal note and summary, the statutes are rather restrictive. "The fiscal note and fiscal note summary shall state the measure's estimated cost or savings, if any, to state or local governmental entities." § 116.175.

Assuming the statute is constitutional, the statute clearly limits the Auditor's authority. Cannons of statutory construction do not allow an interpretation of the statute that expands the Auditor's authority beyond that contained in the language of the statute. *Emery v. Wal-Mart Stores, Inc.* 976 S.W.2d 439, 449 (Mo. banc 1998). The plain language of the statute limits the Auditor's authority to stating the cost or savings to state

or local government[5] and this authority does not include commenting on how those costs or savings might be used. As discussed, *supra,* in Point I, summarizing the legal and probable effect of the initiative is the Secretary's responsibility, not the Auditor's.

But the Auditor's comment, in the second sentence of the fiscal summary, to prospective signers that the "*revenue will fund only programs and services allowed by the proposal*" is not a statement of cost or savings rather it is a comment on the substantive limitations of the measure. The Auditor admitted it when the office produced a designated official to be deposed on the Auditor's behalf. During questioning about the second sentence of the fiscal note summary, the Auditor said the following:

Q. Okay. What's the second sentence mean?

A. Basically it was describing to the voter what would happen with this money.

Q. With what money?

A. The -- the potential increase in revenue.

* * *

Q. What's the purpose of putting that sentence in your fiscal note

[5] Although the statute never discusses estimating "revenue" from an initiative, the Auditor's testimony below was that revenue is included within the meaning of the terms cost and savings. Because there was no evidence presented to rebut this testimony, Appellant does not dispute that revenue is cost or savings solely for the purposes of this Brief in this case.

summary?

A. Again, the idea would be there that the readers would know again what the money is going to be used for.

Q. Looking back at 116.175, which is Exhibit 6, is that statement a statement of cost?

A. No.

Q. Is it a statement of savings?

A. No.

* * *

Q. And so what is the purpose of letting people know, telling people in the fiscal note summary that the revenue raised is going to be limited or is supposed to be limited in its usage?

A. Well, I don't have the luxury of seeing what the ballot language is going to indicate, so I don't know what's in the ballot language, but if a -- to me if a reader is looking at this and saying, oh, the State is going to get an extra $300 million, I think it's important for them to understand that there may be restrictions on how that money can be spent.

Pl. Ex. 33, Dep. 46:7-48:17.

The Auditor admits that his fiscal note summary strays into the province of the Secretary of State. The comment that the language was added because the Auditor had not seen the ballot language in advance, so thought this language was important, is a clear admission that the Auditor's summary strayed into the ballot language which must be

provided by the Secretary, not the Auditor, and which is limited to 100 words separate from whatever the Auditor's summary says. A fair paraphrase of the Auditor's testimony is that he wasn't sure if the Secretary would do her job, so he did it for her.

As a practical matter, the Summary Statement of the measure exceeds the 100 word limit because the Secretary used 97 words and then the Auditor used 12 more to do the Secretary's job and add to the summary. The legislature did not authorize the Auditor to summarize the effect of the measure, but only to estimate cost or savings. Moreover, as is evident from Point IV below, even if the legislature wanted to, it *does not have* the authority to assign the Auditor the task of summarizing the initiative's legal effects. MO. CONST. art. IV, § 13.

This error is further compounded by what the Secretary *did* include in the portion of the official ballot title that is within her province. As discussed in Point II, the Secretary told potential signers of the initiative that the funds generated by the initiative would be used for specific programs (reducing tobacco use and education) and did nothing to tell potential signers that there might be other uses. The Auditor then added to the summary statement by telling signers that the funds could *only* be used for programs allowed by the measure. Anyone reading the Official Ballot Title would come to the conclusion that the funds may only be used for tobacco use reduction and education.

As a result, the Official Ballot Title deceives potential signers. Whether funds may be used to fund administrative costs and bureaucratic overhead is an important point. Voters would be more likely to vote for a measure that keeps the funds sacrosanct for tobacco use reduction and education and less likely to vote for a program that allows the

funds to be used for administrative costs. In 2006, when a tobacco tax initiative was summarized, the Secretary thought it important to include the fact that funds generated by the tax might be used for administrative costs. Pl. Ex. 31. The State Auditor acknowledges this information is likely to influence citizens when he says, "I think it's important for them to understand there may be restrictions on how that money can be spent." Pl. Ex. 33, Dep. 48:8-10. While it is important for the potential signers to understand the restrictions, the official ballot title in this case mischaracterizes those restrictions and therefore it is insufficient and unfair. *Cures*, 259 S.W.3d 76.

The statute is clear that the Auditor's fiscal note summary shall only contain a statement of "estimated cost or savings." § 116.175. To uphold the decision below, this Court would have to add language to the statute such as "and the possible uses or restrictions on such costs or savings." Of course the Court should not and cannot do so and the trial court must be reversed.

III. THE TRIAL COURT ERRED AS A MATTER OF LAW BY DENYING PLAINTIFF'S REQUEST FOR A DECLARATORY JUDGMENT THAT SECTION 116.175 VIOLATES MISSOURI'S CONSTITUTION BECAUSE SECTION 116.175 IS DIRECTLY IN CONFLICT WITH ARTICLE IV, SECTION 13 OF THE MISSOURI CONSTITUTION IN THAT SECTION 116.175 PURPORTS TO IMPOSE A DUTY ON THE AUDITOR THAT IS NOT "RELATED TO THE SUPERVISING AND AUDITING OF THE RECEIPT AND EXPENDITURE OF PUBLIC FUNDS."

There is no dispute that the official ballot titles at issue in this case included fiscal note summaries that were prepared by the State Auditor under the authority of section 116.175. L.F. 320-21; J. Ex. 2, 3, 5, 7, 8, 10, 12, 13, 15,17, 18, 20, 22, 23, 25, , 27, 28, 30; Pl. Ex. 35, Interrog. No. 5. The issue before this Court is whether the imposition of initiative petition fiscal note and fiscal note summary duties upon the State Auditor by section 116.175 violates the express language of article IV, section 13 of the Missouri Constitution, which limits the duties that may be imposed upon the Auditor.

The assignment of this fiscal note duty to the Auditor is relatively new. It was imposed upon him after a successful challenge to the constitutionality of the statute assigning the duty to the Joint Committee on Legislative Research, *Thompson v. Committee on Legislative Research*, 932 S.W.2d 392 (Mo. banc 1996). In *Thompson,* this Court found that article III, section 35 of the Missouri Constitution limited the Joint Committee's duties to those that are advisory to the General Assembly, that the fiscal note summary duty fell outside that limitation and the statute was invalid. *Id.* at 394-95. A fiscal note summary for an initiative petition is advisory to the people, not the General Assembly. *Id.* at 395. The statute was therefore unconstitutional. *Id.* The constitutional language limiting the Committee is less restrictive on its face than the Auditor's restriction in article IV, section 13.

In contrast to the constitutional provision address in *Thompson,* Article IV section 13 states:

> The state auditor . . . shall establish appropriate systems of accounting for all public officials of the state, post-audit the accounts of all state agencies

> and audit the treasury at least once annually. He shall make all other audits and investigations required by law, and shall make an annual report to the governor and general assembly. He shall establish appropriate systems of accounting for the political subdivisions of the state, supervise their budgeting systems, and audit their accounts as provided by law. ***No duty shall be imposed on him by law which is not related to the supervising and auditing of the receipt and expenditure of public funds.***

(Emphasis supplied). Nothing in this provision gives the Auditor express authority to engage in predicting future budget impacts. Moreover, nothing in this provision allows the Auditor to have any role in the elections process or the processes for amending the laws.

A. The duties allowed to be imposed by article IV, section 13

The duties assigned to the Auditor under section 116.175 are clearly not: (1) establishing appropriate systems of accounting for all public officials of the state; (2) post-audit of the accounts of all state agencies; (3) an audit of the treasury; or (4) establishing appropriate systems of accounting for the political subdivisions of the state, supervising their budgeting systems or auditing their accounts as provided by law. MO. CONST. art IV, § 13. Accordingly, to be valid, the duties must fall under some other allowable duty under article IV, section 13.

B. The duties imposed by section 116.175

The plain language of section 116.175, the Auditor's own interpretation of section 116.175 and judicial interpretations of section 116.175 make clear that fiscal notes and

fiscal note summaries are forecasts of possible future fiscal impacts in the event a proposed initiative is adopted. The fiscal note and summary is prepared at a time when there are no state funds to supervise or audit, rather the exercise is in predicting what might happen in the future. In order to predict the future cost or savings, the Auditor must assume that several things occur: (a) a proposed measure is circulated for signatures; (b) those signatures are turned into the Secretary; (c) the Secretary certifies that there are sufficient signatures to place the measure on the ballot; (d) the measure is placed on the ballot; and (e) the measure is adopted by a vote of the people. Section 116.175 states in pertinent parts:

> 1. Except as provided in section 116.155, upon receipt from the secretary of state's office of any petition sample sheet, joint resolution or bill, *the auditor shall assess the fiscal impact of the proposed measure*. The state auditor may consult with the state departments, local government entities, the general assembly and others with knowledge pertinent to the cost of the proposal. Proponents or opponents of any proposed measure may submit to the state auditor a proposed statement of fiscal impact estimating the cost of the proposal in a manner consistent with the standards of the governmental accounting standards board and section 23.140 . . .
>
> * * *
>
> 3. The fiscal note and fiscal note summary shall state the measure's *estimated* cost or savings, if any, to state or local governmental entities.

> The fiscal note summary shall contain no more than fifty words, excluding articles, which shall summarize the fiscal note in language neither argumentative nor likely to create prejudice either for or against the proposed measure.
>
> * * *

(Emphasis supplied).

The Auditor concedes that fiscal notes and fiscal note summaries are not audits, and preparing them is not auditing. Pl. Ex. 33, Dep. 20:21-21:9; Tr. 26:8-14. No audits are referred to in conducting them. Tr. 34:3-10. No codified standards applicable to audits apply to the preparation of fiscal notes and fiscal note summaries or the fiscal note and summaries themselves. Pl. Ex. 33, Dep. 21:10-21:21. In fact, the Auditor is aware of no standards at all that apply to the preparation and content of fiscal notes and fiscal note summaries except for section 116.175. Pl. Ex. 33, Dep. 21:22-22:18; Tr. 28:20-25; Pl. Ex. 35, Interrog. No. 5. The Auditor has no written policies or procedures in place setting forth how to go about preparing a fiscal note or fiscal note summary. Tr. 34:19-35:4. The person who prepares the notes and summaries does not need to have any particular educational background, skills or training. Tr. 32:4-13, 31:23-32:3.

What the Auditor does is receive a document from the Secretary, send it out to state agencies and a select group of local governments and waits to receive responses. Pl. Ex. 35, Interrog. No. 5. It might also receive an unsolicited submission from someone declaring themselves to be an opponent or proponent, but the Auditor does nothing to make it known that he has received a sample sheet from the Secretary. *Id.* The fiscal

note is simply verbatim recitations of what was received from the government entities and, if applicable, any proponents or opponents. *Id.*; Tr. 35:4-10. The only review done by the Auditor in preparing the fiscal note is to see if it appears the agency submission is missing pages or is not on the correct measure. Pl. Ex. 35, Interrog. No. 5; Dt. Ex. B, 28:3-29:2. The fiscal notes, then, are a regurgitation of the submissions without any value added.

No independent analysis is done by the Auditor, no independent research is conducted. Pl. Ex. 35, Interrog. Nos. 5, 13, 14, 15, 22; Tr. 92:14-93:1. The fiscal notes do not contain the Auditor's analysis of the measure. *Id.* The fiscal note summary is not an attempt to summarize the probable effects of the measure if passed, it is a summary of the information received – it is a summary of the fiscal note, which is comprised of verbatim submissions from others. Pl. Ex. 33, Dep. 67:24-68:5. Unless a submission is deemed unreasonable by the Auditor, it will be considered in the summary. Pl. Ex. 35, Interrog. No. 5. The Auditor will not second guess information in a submission that is not on its face unreasonable. *Id.*; Tr. 92:14-93:1. The Court of Appeals has agreed that the Auditor's interpretation of his duties under section 116.175 is correct. *MML I*, --- S.W.3d ----, 2011 WL 3925612 (Mo. App. 2011) and *Missouri Mun. League v. Carnahan*, 303 S.W.3d 573 (Mo. App. 2010).

C. Fiscal notes and fiscal note summaries are forecasts

The Court of Appeals has long recognized that fiscal notes and fiscal note summaries for initiative petitions are "forecasts" of the fiscal impact of proposed laws rather than audits. *Hancock v. Secretary of State*, 885 S.W.2d 42, 49 (Mo. App. 1994);

see also *Missourians Against Human Cloning v. Carnahan*, 190 S.W.3d 451, 463 (Mo. App. 2006)(Smart, J., separate opinion concurring in part and dissenting in part, discussing fiscal notes as "fiscal predictions" and "forecasting future areas of budget cuts"). Additionally, the Auditor has admitted it is a forecast. Tr. 41:7-24. "Forecast" is defined as "a prophecy, estimate, or prediction of a future happening." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 888 (2002).

D. No duty shall be imposed on the Auditor by law "which is not related to the supervising or auditing of the receipt and expenditure of public funds" is a limitation on authority

The Constitution does not allow the Auditor to be given duties of prophecy. The wording of section 13 must be viewed in context; and the words chosen are presumed intentional, not meaningless surplusage. *State ex rel. Upchurch v. Blunt*, 810 S.W.2d 515, 516 (Mo. banc 1991); *Buechner v. Bond*, 650 S.W.2d 611, 613 (Mo. banc 1983). Words in a constitutional provision are to be interpreted to give effect to their plain, ordinary and natural meaning which the people commonly understood the words to have when the provision was adopted. *Buechner*, 650 S.W.2d at 613. The commonly understood meaning of words is derived from the dictionary. *Id.* This Court has already applied these general rules of construction to a provision substantially similar to section 13, and also commented on the purposes of section 13 itself.

1. *Farmer v. Kinder* and the meaning of "related to"

In *Farmer v. Kinder*, 89 S.W.3d 447 (Mo. banc 2002), this Court addressed the constitutional equivalent of section 13 as regards the State Treasurer, section 15,

specifically the phrase found in that section: "No duty shall be imposed on the state treasurer by law which is not related to the receipt, investment, custody and disbursement of state funds and funds received from the United States government." At issue in the case was whether a state statute, section 447.575, RSMo, was unconstitutional because it placed a duty on the Treasurer regarding the Uniform Disposition of Unclaimed Property Act (UDUPA) that did not fit within that limiting language in section 15. The statute authorized the Treasurer to bring suit against persons who refused to deliver unclaimed property to the state as required under the UDUPA. The court did not decide the issue of whether the funds were or were not of the type covered. It determined that suing "to collect or enforce delivery" was not "related to the receipt, investment, custody and disbursement of . . . funds." The Treasurer had argued that because the Constitution is to be read more broadly because of its permanent nature, collecting unclaimed property by lawsuit was *related to* the receipt, investment, custody and disbursement of funds. This Court disagreed, stating:

> [T]his Court finds that article IV, section 15 does not expressly or implicitly grant the treasurer authority to enforce delivery of property but, to the contrary, specifically denies her that power. The treasurer would have us construe section 15 as if it were a broad grant of power to undertake actions not limited to those related to receipt, investment, custody and disbursement of state funds and funds received from the United States government. *But, the words used to describe the treasurer's powers do not broaden or expand the treasurer's authority, but rather are words of*

restriction. The constitution enumerates very specific powers that the treasurer may exercise and, then, specifically provides that no duty not related to those specifically enumerated powers may be exercised by her.

Farmer, 89 S.W.3d at 452 (citations omitted)(emphasis supplied).

The *Farmer* court went on to explain the history of the various limiting language in the constitutional provisions regarding various elected officials:

> The narrow grant of authority to the treasurer is in keeping with the narrow grant of authority by the 1945 constitution to certain other elected officials. Just as article IV, section 15 sets limits on the power of the treasurer, so article IV, section 13 provides: "[n]o duty shall be imposed on [the state auditor] by law which is not related to the supervising and auditing of the receipt and expenditure of public funds." . . . There were no similar limitations in the 1875 Constitution, and this Court has previously recognized that it was to correct this situation that these limiting provisions were added to the 1945 constitution, for:
>
> > the background of the 1945 provision lies in the prior history of a building up of the power and patronage of elected officials by giving to them new functions and duties. One purpose of the new constitution was to limit and define the scope and duties of all executive officials (see § 12, Art. 4,) agencies, and departments, including elected officials.

Petition of Bd. of Pub. Bldngs., 363 S.W.2d 598, 608 (Mo. banc 1962).

> Indeed, the 1944 debates over the 1945 constitution themselves show that the delegates to the constitutional convention drafted it with an eye towards their concern that power had been too widely distributed among a variety of elected officials under the 1875 constitution and that a focusing of more executive power in the office of the governor and his or her appointees might lead to more effective government. One way the 1945 constitution sought to accomplish this goal was by precluding the expansion of the state treasurer's role beyond that of custodian of state funds and by similarly limiting the power of the state auditor and secretary of state. *See* DEBATES, MISSOURI CONSTITUTIONAL CONVENTION 1945, vol. 13, 4127-4135; vol. 14, 4171-4173.

Id. at 453-54.

With this background, this Court concluded in *Farmer* that the limitation on the imposition of duties to those *related to* certain enumerated duties "restricts rather than expands the role of the state treasurer" and to read the language any other way would be "inconsistent with the section's plain language." *Id.* at 454.

In light of *Farmer v. Kinder*'s application of "related to," the common dictionary definition that also reflects what the ordinary person would understand the term to mean is "connected." WEBSTER'S II NEW COLLEGE DICTIONARY 935 (2001). Because the identical principles of law from *Farmer* apply to article IV, section 13, the Constitution provides limits on the authority of the Auditor as well. The words in section 13 that "No

duty shall be imposed on him by law which is not related to the supervising and auditing of the receipt and expenditure of public funds" are words of limitation, not expansion.

2. The preparation of fiscal notes and fiscal note summaries is not related to the supervising of the receipt and expenditure of public funds

"Supervision" is "the act, process, or occupation of supervising: direction, inspection, and critical evaluation: oversight, superintendence." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2296 (2002). No supervising takes place in the preparation of fiscal notes and fiscal note summaries. The Auditor sends the proposed measure out and waits for agencies to voluntarily respond. Pl. Ex. 35, Interrog. No. 5. It puts the responses verbatim in the fiscal note. *Id.* The fiscal note summary is not an attempt to summarize the probable effects of the measure if passed, it is a summary of the information received – it is a summary of the fiscal note, which is comprised of verbatim submissions from others. Pl. Ex. 33, Dep. 67:24-68:5. The Auditor will not second guess information in a submission that is not on its face unreasonable and if a submission is not unreasonable, it will be considered in the summary. Tr. 92:14-93:1; Pl. Ex. 35, Interrog. No. 5.

This is not supervising the receipt and expenditure of public funds. It is not supervising at all. There is no critical evaluation or inspection; there is no direction. The preparation of fiscal notes and fiscal note summaries is the antithesis of supervision because it is a quintessentially *laissez faire*. This could not possibly be the meaning of

"supervising" that the people intended as it would allow for lack of ultimate responsibility or meaningful oversight of the receipt and expenditure of public funds.

3. The preparation of fiscal notes and fiscal note summaries is not related to the auditing of the receipt and expenditure of public funds

Having established that the duties imposed by section 116.175 are not audits and are forecasts, it remains to elaborate upon the fact that they are not "related to the auditing of the receipt and expenditure of public funds." Art. IV, § 13. The Auditor admitted he does not refer to any audits in preparing fiscal notes and fiscal note summaries. Nor does he use any auditing standards.

This Court has twice examined the meaning of "audit" and "post-audit" within section 13. In *Director of Revenue v. State Auditor*, 511 S.W.2d 779 (Mo. 1974), a division of this Court addressed whether the Auditor had authority to examine individual tax returns in post-auditing the accounts of the Department of Revenue. In determining what the authority of the Auditor is under section 13, this Court looked to various definitions as follows:

> The parties stipulated that "audit" means: "An examination of financial statements by an independent auditor in order that the auditor may present an opinion as to the fairness with which the financial statements present the financial position of the entity audited."
>
> And from Governmental Accounting, Auditing, and Financial Reporting by the National Committee on Governmental Accounting, 1968:

> "AUDIT. The examination of documents, records, reports, systems of internal control, accounting and financial procedures, and other evidence for one or more of the following purposes:
>
> (a) To ascertain whether the statements prepared from the accounts present fairly the financial position and the results of financial operations of the constituent funds and balanced account groups of the governmental unit in accordance with generally accepted accounting principles applicable to governmental units and on a basis consistent with that of the preceding year:
>
> (b) To determine the propriety, legality and mathematical accuracy of a governmental unit's financial transactions;
>
> (c) To ascertain whether all financial transactions have been properly recorded; and
>
> (d) To ascertain the stewardship of public officials who handle and are responsible for the financial resources of a governmental unit."

Director of Revenue, 511 S.W.2d at 782-83. Over 20 years later, in *State Auditor v. Joint Committee on Legislative Research*, 956 S.W.2d 228, 232 (Mo. banc 1997), this Court examined the issue again, focusing on a standard dictionary definition, finding:

> Thus, for purposes of article IV, section 13, an audit is a "methodical examination and review of a situation or condition (as within a business

enterprise) concluding with a detailed report of findings." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 143 (1976).

This definition remains valid. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 143 (2002).

None of these definitions would support that fiscal note and fiscal note summary preparation is related to auditing of the receipt and expenditure of public funds. Fiscal notes and fiscal note summaries are forecasts of possible future fiscal impact. They are not connected to an audit in any way. The methods followed by the Auditor for fiscal note and fiscal note summary preparation are in stark contrast to audits: the Auditor does not follow auditing standards; the Auditor actually has no standards to follow except section 116.175; the Auditor does not rely on or refer to any audits; the Auditor does not perform an independent evaluation; the Auditor does not second guess what it receives; the Auditor does not review any existing accounts or situation.

Nor are the fiscal note and fiscal note summary connected to any ongoing audit. Contrast section 116.175 with various powers given the Auditor by statute that are clearly connected to auditing:

- Administration of oaths and affirmations, § 29.110;
- Having free access to all offices of this state for the inspection of such books, accounts and papers, §§ 29.130, 29.240;
- Referring to the prosecuting attorney any officer who refuses to submit to an audit or to be examined upon oath, § 29.250;
- Charging the costs for certain audits, § 29.230; and

- Compelling testimony and production of documents, § 29.235.

These are powers related to auditing. They are done in the context of an audit. They are done so that an audit may begin, be completed, or be paid for. These are connected to audits. Fiscal note and fiscal note summary preparation is not connected to audits.

4. The preparation of fiscal notes and fiscal note summaries is not related to the supervising and auditing of *the receipt and expenditure of public funds*

Article IV, section 13 also includes in the limiting provision the phrase "the receipt and expenditure of public funds." Any supervising or auditing duties imposed upon the Auditor must *also* involve the receipt and expenditure of public funds. There are no state funds yet at issue with an initiative petition so there can be no receipt or expenditure of public funds to be audited or supervised. Rather, the Auditor is forecasting the future effect of a measure that may not be adopted so that potential signers of an initiative can decide whether they want it to be placed on the ballot. There are no state funds to supervise or audit at the time the Auditor prepares the fiscal note and summary for the initiative. The duties assigned to the Auditor under section 116.175 are not related to the supervising and auditing of the receipt and expenditure of public funds and are therefore in violation of article IV, section 13.

E. Conclusion

Were this Court to hold otherwise, it would open the door for the Auditor to be assigned any duty related to budgeting or forecasting of future state revenues or costs,

e.g., budgeting duties for executive branch departments, which is currently assigned by Chapter 33 to the Division of Budget and Planning, or budgeting for the judiciary, currently assigned to the judges of the Courts by section 476.265. In briefing below, the Auditor argued for such a result, telling the trial court that "related to" should be read to mean "having characteristics in common with"[6] as in how one is related to one's cousin. Allowing the auditor to perform any function that is a close cousin to auditing ignores the clear intent of the constitutional provision as discussed in *Farmer.* The purposes of the constitutional restriction, thoroughly reviewed in *Farmer,* would be abandoned. Instead, this Court should follow *Farmer,* by acknowledging the plain language as well as the history of the Constitution's restriction of the Auditor to the function of supervising and auditing of the receipt and expenditure of public funds.

IV. THE TRIAL COURT ERRED AS A MATTER OF LAW BY DENYING PLAINTIFF'S REQUEST FOR A DECLARATORY JUDGMENT THAT SECTION 116.175 VIOLATES MISSOURI'S CONSTITUTION BECAUSE CLAIM PRECLUSION REQUIRED ENTRY OF JUDGMENT IN THAT THE SAME ISSUE HAD PREVIOUSLY BEEN LITIGATED BETWEEN THE SAME PARTIES, A FINAL JUDGMENT HAD BEEN ENTERED BY ANOTHER COURT AND THAT JUDGMENT HAS NEVER BEEN APPEALED.

[6] L.F. 297 (Def. Schweich's Suggs, in Opp'n to Pl.'s Mot. For J. on the Pleadings).

The trial court took judicial notice of final judgments in *Ralph Brown v. Missouri Secretary of State Robin Carnahan and Missouri State Auditor Thomas A. Schweich:* (1) Case No. 11AC-CC00400, final judgment issued March 28, 2012; (2) Case No. 12AC-CC00046, final judgment issued March 28, 2012; (3) Case No. 12AC-CC00077, final judgment issued March 28, 2012; and (4) Case No. 12AC-CC00048, final judgment issued March 28, 2012. Tr. 23:19-24:9; App. A31-A59. These judgments are dispositive of Appellant Brown's Count IV below.

Defendant Schweich has not appealed three of these judgments although he filed a notice of appeal in Case No. 12AC-CC00077 (SC92492). App. A31-A59. Accordingly, the doctrine of claim preclusion requires that this Court enter judgment in favor of Appellant Brown under Count IV, the challenge to the constitutionality of section 116.175 because this claim has already been decided in Appellant's favor and against Defendant Schweich and the State.

A. Claim preclusion

The common law doctrine of res judicata, more currently referred to as claim preclusion, precludes relitigating a claim already decided. *Chesterfield Village, Inc. v. City of Chesterfield*, 64 S.W.3d 315, 318 (Mo. banc 2002). The twin doctrines of claim and issue preclusion preclude a party that has had its day in court "from taking a second bite at the apple." *Fleming v. Mercantile Bank & Trust Co.*, 796 S.W.2d 931, 935 (Mo. App. 1990). This is precisely what is happening here – Auditor Schweich had his day in court on this claim multiple times, but it was not until a final unappealable judgment existed that the doctrine is available. This did not occur until after the hearing in the case

below.[7] But in three of the *Brown* cases, there was no appeal, and the judgment that section 116.175 violates Missouri Constitution article IV, section 13 became final.

For claim preclusion to apply, "four identities" must occur:

(1) identity of the thing sued for;

(2) identity of the cause of action;

(3) identity of the persons and parties to the action; and

(4) identity of the quality of the person for or against whom the claim is made.

King General Contractors, Inc. v. Reorganized Church of Jesus Christ of Latter Day Saints, 821 S.W.2d 495, 501 (Mo. banc 1991). The four identities are met as between this case and the three other *Brown* cases.

1. The thing sued for is identical

The "thing sued for" is the general type of relief sought. See *State ex rel. J.E. Dunn Constr. Co. v. Fairness in Constr. Bd. of K.C.*, 960 S.W.2d 507, 515 (Mo. App. 1997); *Jordan v. Kansas City*, 929 S.W.2d 882, 886 (Mo. App. 1996). Count IV in this case is identical to the claims in the three other *Brown* cases for which Brown sought a finding by the court that the delegation to the State Auditor of the duty to prepare a fiscal

[7] Without knowing whether the ten day appeal time period in section 116.190 would apply to the other *Brown* cases, which were decided solely on the statutory challenge, the last day to file a notice of appeal from those as yet unappealed cases was the day of the hearing in the case below – May 7, 2012. As such, a final unappealable judgment did not, with certainty, exist until after the hearing in the case below.

note and fiscal note summary provided by section 116.175 violates the limitation of article IV, section 13 of the Missouri Constitution. A review of the same count in the three other *Brown* cases will find them to even be worded the same as the count in this case. Clearly the thing sued for in each case is identical – a finding of unconstitutionality of a statute.

2. The cause of action is identical

In 2002, the Missouri Supreme Court noted that res judicata is Latin for "a thing adjudicated" and noted the definitions found in Black's Law Dictionary, stating:

> The key question is what is the "thing"—the claim or cause of action—that has previously been litigated? A claim is "[t]he aggregate of operative facts giving rise to a right enforceable by a court." The definition of a cause of action is nearly the same: "a group of operative facts giving rise to one or more bases for suing." Whether referring to the traditional phrase "cause of action" or the modern terms "claim" and "claim for relief" used in pleading rules such as Rule 55.05, the definition centers on "facts" that form or could form the basis of the previous adjudication.

Chesterfield Village, 64 S.W.3d at 318.

The cause of action in this case and the three other *Brown* cases are identical. It is not the contents of the measure, or the fiscal note and fiscal note summary that are the key facts; all that is relevant is that a fiscal note summary was prepared and included in the official ballot title of some proposed measure. As such, each Brown case and this case are based upon the same operative facts – an initiative petition was submitted, the

State Auditor prepared a fiscal note and a fiscal note summary under section 116.175, and the fiscal note summary was included in the official ballot title certified by the Secretary of State. The cause of action is identical.

3. The persons and parties to the actions are identical

Ralph Brown is the Plaintiff in this case and in the three other *Brown* cases. State Auditor Thomas Schweich and Secretary of State Robin Carnahan are defendants in this case and in the other three *Brow*n cases. The intervention by MHE, McCarter and Taylor does not nullify the identity of parties that exists as among these cases. The addition of new parties who are unnecessary to the determination of the issues does not get the Auditor and the State out of the previous final judgments against them. *Fleming*, 796 S.W.2d at 935 (quoting *Reis v. LaPresto*, 324 S.W.2d 648, 653 (Mo. 1959)).

The Intervenors are not necessary to the determination of whether a statute is constitutional. The fact that persons sought to intervene and were granted intervention because of the claims challenging the official ballot title and fiscal notes should not affect the application of claim preclusion. To do so would preclude a meaningful resolution of actions seeking to have a statute declared unconstitutional.

4. The quality of the person against whom the claim is made is identical

As to the fourth identity, "quality of the person" has been said to apparently refer to the status in which the person sues or is sued. *Fleming*, 796 S.W.2d at 935 (citing *Lewis v. Barnes Hosp.*, 685 S.W.2d 591, 594 n.1 (Mo. App. 1990)). In *Fleming*, the Bank was a party as a bank in both actions. In *Eugene Alper Constr. Co. v. Joe*

Garavelli's of West Port, Inc., no identity of quality of the person was found where in the first action a person was sued as an individual and in the second suit the person was sued in his capacity as a director and shareholder of a company. 655 S.W.2d 132, 136 (Mo. App. 1983). In this case and in the other three *Brown* cases, Mr. Schweich is sued in his official capacity as the Missouri State Auditor. It is against him that the claim is made. This identity requirement is also met.

B. Appellant Brown has not waived his right to raise claim preclusion

The trial court's finding that Brown waived the application of claim preclusion is contrary to the facts of the case. Brown could not have included it in his pleadings or briefs because of the timing. No final unappealable judgment existed until after the day of the hearing, May 7, 2012, had passed without a notice of appeal being filed. There is no law addressing which appeal time period would apply to the three *Brown* cases because the sole finding of the trial court judge was on the declaratory judgment claim. For Brown to have raised it earlier would have compromised his legal position in the event notices of appeal were filed and it was eventually determined they were timely filed.

The fact that it was not raised in a filing denominated a motion is a puzzling basis for the trial court's decision as well. Again, the hearing had already taken place. What a document is titled should not be determinative. The facts and the doctrine were brought to the trial court's attention when it was "ripe." This should be the key.

Even if it had not been raised to the trial court, the law states that it can be raised in briefs on appeal. "[W]here the [other] adjudication was not available until an appeal

had been taken in the [case at issue], res judicata may properly be raised in a motion to dismiss filed in the appellate court or in the appellate briefs." 47 AM. JUR. 2D *Judgments* § 636 (2006) (citations omitted).

Claim preclusion requires this Court to bind the State Auditor to the result in the final, no longer appealable judgments in the other three *Brown* cases. Accordingly, this Court should find that the delegation to the State Auditor of the duty to prepare a fiscal note and summary provided by section 116.175 violates the limitations of article IV, section 13 of the Missouri Constitution and that section 116.175 is therefore unconstitutional.

CONCLUSION

For the foregoing reasons, Appellant Ralph Brown respectfully requests this Court to reverse the trial court's judgment and:

(1) find that the Summary Statements are insufficient and unfair;

(2) remand the case to the trial court for certification of a sufficient and fair summary statement to the Secretary of State;

(3) declare that section 116.175 is unconstitutional as it violates the limitations on the duties that can be imposed on the State Auditor by article IV, section 13; and

(4) direct the trial court to enter judgment consistent herewith.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

WITH RULE 84.06(b), (c) and (g)

The undersigned counsel certifies that on this 11th day of June 2012, a true and correct copy of the foregoing brief was served on the following by eService of the e-Filing System and a Microsoft® Office Word 2007 version was e-mailed to:

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The undersigned counsel further certifies that pursuant to Rule 84.06(c), this brief:

(1) contains the information required by Rule 55.03;

(2) complies with the limitations in Rule 84.06(b) and contains 15,765 words, exclusive of the sections exempted by Rule 84.06(b), determined using the word count program in Microsoft® Office Word 2007; and

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